No. 20-828

In The
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, et al.,

Petitioners,

v.

YASSIR FAZAGA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS PAT ROSE, PAUL ALLEN AND KEVIN ARMSTRONG IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Section 1806 of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801, *et seq.*, governs the "[u]se of information" obtained or derived from electronic surveillance for foreign-intelligence purposes under FISA. 50 U.S.C. § 1806. Section 1806(c) and (d) require the federal or a state government to provide notice to an aggrieved person whenever it intends to introduce such information as evidence in any proceedings against that person. Section 1806(e) affords the aggrieved person the opportunity to move to suppress any such information that was not obtained in compliance with FISA. And Section 1806(f) establishes special *in camera* and *ex parte* procedures to determine the admissibility of such evidence, if the Attorney General attests that a typical adversarial hearing would harm the national security of the United States. The question presented is as follows:

Whether Section 1806(f) displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

PARTIES TO THE PROCEEDING BELOW

Petitioners are the United States of America, the Federal Bureau of Investigation (FBI); Christopher A. Wray, in his official capacity as the Director of the FBI; and Kristi K. Johnson, in her official capacity as the Assistant Director of the FBI's Los Angeles Division, each of whom is a defendant in the district court.

The Respondents filing this brief are Paul Allen, Kevin Armstrong and Pat Rose, each of whom was a defendant sued in his or her individual capacity in the district court. The other Respondents are Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim, each of whom is a plaintiff in the district court; as well as J. Stephen Tidwell and Barbara Walls, each of whom was a defendant sued in his or her individual capacity in the district court.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):
Fazaga v. FBI, No. 11-cv-301 (Aug. 14, 2012)

United States Court of Appeals (9th Cir.):
Fazaga v. FBI, No. 12-56867 (July 20, 2020)

RULE 12.6 STATEMENT

Pursuant to Rule 12.6, counsel for all parties were timely notified of Respondents Paul Allen, Kevin Armstrong and Pat Rose's intent to file this brief.

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Respondents Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim (Plaintiffs) contend that Respondents Paul Allen, Kevin Armstrong and Pat Rose (the Respondent Agents) were part of an investigation known as Operation Flex, in which the FBI allegedly gathered information about Plaintiffs and other Muslims based solely on their religion. Asserting that the investigation violated the First and Fifth Amendments (among other laws), Plaintiffs seek monetary damages from the Respondent Agents under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens*). The Respondent Agents are confident that they would defeat these claims, if only they had the same opportunity to defend themselves that is afforded to other federal officers accused of violating the Constitution. However, the Ninth Circuit Court of Appeals' decision below denies the Respondent Agents that opportunity.

The decision below arises out of the Government's assertion in the district court that the identity of the individuals under investigation in Operation Flex and the reasons for investigating those individuals are state secrets. As the district court found, that assertion should spell the end of the case – since the court cannot hear evidence as to who the FBI investigated or why, it cannot adjudicate whether the government targeted Plaintiffs based on their religion, and therefore Plaintiffs' *Bivens* claims must be dismissed.

Yet, the Ninth Circuit reversed, holding that Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801, *et seq.*, displaces the state secrets privilege. As a result, the court of appeals held, the district court cannot dismiss the case. Instead, the decision below interpreted Section 1806(f) as requiring the district court to hear the state secrets evidence *in camera* and *ex parte*, and on that basis, determine whether the Respondent Agents violated the Constitution.

The government's Petition For A Writ Of Certiorari capably explains why the Ninth Circuit's erroneous interpretation of Section 1806(f) requires immediate review by this Court, and the Respondent Agents join in that Petition in full. But the decision below suffers from an additional constitutional infirmity not addressed by the government: by requiring the district court to determine the Respondent Agents' *Bivens* liability in a secret trial, on secret evidence, the Ninth Circuit has deprived the Respondent Agents of their Seventh Amendment right to a trial by jury. This incipient violation of the Respondent Agents' constitutional rights provides a further reason for immediate review by this Court.

STATEMENT

The Respondent Agents join in the Statement included in the government's Petition. In addition, the Respondent Agents offer the following supplemental

information concerning the disposition of their Seventh Amendment argument below.

The Ninth Circuit held that the Respondent Agents' "Seventh Amendment argument is premature," because Plaintiffs' claims may be resolved before they could reach a jury. Pet. App. 65a. For example, the court of appeals noted, the trial court may dismiss Plaintiffs' damages claims in light of recent decisions by this Court that "have severely restricted the availability of *Bivens* actions for new claims and contexts" like the ones asserted here. *Id.*, *see also* Pet. App. 71a (*citing Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)). Accordingly, the Ninth Circuit "decline[d] to address the hypothetical constitutional question" raised by the Respondent Agents at this time. *Id.*

REASONS FOR GRANTING THE PETITION

The Respondent Agents agree that the government's Petition should be granted for the reasons stated therein. Specifically, the Respondent Agents agree that Section 1806(f) is unambiguous, that the Ninth Circuit's construction thereof is implausible, and that the decision below should be reversed on that basis. Moreover, to the extent the foregoing is true, the Respondent Agents concede that there is no need to examine whether the Ninth Circuit's construction of Section 1806(f) also runs afoul of the Seventh Amendment.

A. The Ninth Circuit's Decision Must Be Reversed Under The Canon Of Constitutional Avoidance.

Even if the Ninth Circuit's opinion offers a plausible interpretation of an ambiguous statute, however, immediate review in this Court is warranted, because the canon of constitutional avoidance requires reversal of the decision below.

1. The canon of constitutional avoidance "provides that when a serious doubt is raised about the constitutionality of an act of Congress, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (alterations omitted). If such a construction is permissible, then it should be adopted. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). The canon applies in a wide range of contexts, including as relevant here, where a proffered construction of a federal statute runs afoul of the Seventh Amendment. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) (before "inquiring into the applicability of the Seventh Amendment, we must first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided").

2. The Seventh Amendment to the United States Constitution provides in relevant part that in "Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. This Court has

"consistently interpreted the phrase 'Suits at common law' to refer to 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (*quoting Parsons v. Bedford*, 3 Pet. 433, 447, 7 L.Ed. 732 (1830)). Put another way, the Seventh Amendment embraces "'all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.'" *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (*quoting Parsons*, 3 Pet. at 446-447).

3. Whether "the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages" are quintessential "questions for the jury" under the Seventh Amendment. *City of Monterey*, 526 U.S. at 722. It is thus unsurprising that this Court has held that *Bivens* claims should be heard by a jury. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) (noting that a party can opt for a jury in a *Bivens* suit, unlike an action under the Federal Tort Claims Act). The circuit courts – including the Ninth Circuit – are in agreement. *See, e.g.*, *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000) (following *Carlson* and noting that jury trials are "available in claims against individual defendants under *Bivens*").

4. Presumably in reliance on these authorities, Plaintiffs demanded a jury trial in their complaint. (*See, e.g.*, Case 8:11-cv-00301, Docket no. 1 at 1.)

Plaintiffs also conceded on appeal that their *Bivens* claims must ordinarily be decided by a jury. (Case 12-56874, Dkt. 79-2 at 21 ("As a threshold matter, the Seventh Amendment protects plaintiffs' right to jury trial as well").) In other words, it is undisputed among the parties that, but for the decision below, the Respondent Agents have a right to a jury trial of Plaintiffs' *Bivens* claims.

5. In light of the foregoing, the Ninth Circuit's construction of Section 1806(f) raises serious doubt as to its constitutionality under the Seventh Amendment. That construction requires the district court to adjudicate the merits of Plaintiffs' *Bivens* claims in an *ex parte* and *in camera* proceeding instead of in a trial before a jury. Absent a waiver, the Seventh Amendment simply does not permit a district court judge, rather than a jury, to determine the merits of a *Bivens* claim asserted against a federal officer. By placing sole responsibility for determining liability – and presumably damages – in the hands of the district court judge, the decision below deprives the Respondent Agents of their right to a jury trial.

6. In light of these serious doubts, this Court should adopt the far more plausible interpretation of the statute advanced by the government in its Petition: that Section 1806(f) may create a procedure for "resolving questions of admissibility or suppression" of FISA-related evidence in certain circumstances, but that section does not create "a freestanding *in camera* and *ex parte* mechanism for resolving the merits of a case brought against the government or its officers."

Pet. at 15. This construction comports with FISA's statutory text and pays proper deference to the Executive's responsibility to safeguard the national security, while also avoiding an irreconcilable clash with the Respondent Agents' Seventh Amendment rights.

B. If The Canon Of Constitutional Avoidance Does Not Apply, The Decision Below Should Be Reversed And The Ninth Circuit Required To Address The Respondent Agents' Seventh Amendment Rights.

As noted above, the canon of constitutional avoidance "has no application absent ambiguity" in the subject statute. *Nielsen*, 139 S. Ct. at 972 (quotations omitted). In other words, the canon cannot be used to overturn the Ninth Circuit's interpretation of Section 1806(f), if the statutory text unambiguously supports that interpretation. *Id.*

However, even if this Court were to adopt the Ninth Circuit's construction of the statute, the case should still be remanded to the Ninth Circuit for that court to consider – at this stage in the proceedings, not at a later stage – whether the statute must yield to the Seventh Amendment. *See Nielsen*, 139 S. Ct. at 972 (noting that where constitutional avoidance does not apply, a statute may still fall if a "head-on" challenge establishes that it violates the Constitution); *see also City of Monterey*, 526 U.S. at 707-22 (finding that civil rights claims under 42 U.S.C. § 1983 require a jury under the Seventh Amendment, even though the statute

itself cannot be plausibly interpreted as including such a requirement).

CONCLUSION

For all of the foregoing reasons, this Court's review is warranted, and the government's Petition For A Writ Of Certiorari should be granted.

Respectfully submitted.

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